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| APPLICATION NO.  | FILING DATE | FIRST NAMED INVENTOR   | ATTORNEY DOCKET NO.           | CONFIRMATION NO. |
|--|-------------|------------------------|-------------------------------|------------------|
| 10/714,786   | 11/17/2003  | W. Michael Bissonnette | 03-02                         | 2438             |
| 7590<br>Laura L Conley<br>900 28th Street<br>Suite #201<br>Boulder, CO 80303 |             |                        | EXAMINER<br>VALENTI, ANDREA M |                  |
|  |             |                        | ART UNIT<br>3643              | PAPER NUMBER     |

| SHORTENED STATUTORY PERIOD OF RESPONSE | MAIL DATE  | DELIVERY MODE |
|--|------------|---------------|
| 3 MONTHS                               | 12/27/2006 | PAPER         |

**Please find below and/or attached an Office communication concerning this application or proceeding.**

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

**Office Action Summary**

Application No.

10/714,786

Applicant(s)

BISSONNETTE ET AL.

Examiner

Andrea M. Valenti

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 01 March 2006.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1, 6, 9, 11-13 and 21-34 is/are pending in the application.
- 4a) Of the above claim(s) 33 and 34 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1, 6, 9, 11-13, 21-32 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)                                | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                       | 5) <input type="checkbox"/> Notice of Informal Patent Application                       |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

## **DETAILED ACTION**

### ***Election/Restrictions***

Newly submitted claims 33 and 34 are directed to an invention that is independent or distinct from the invention originally claimed for the following reasons: claims 33 and 34 are directed to a method of making, whereas the originally elected invention is directed to an apparatus. The apparatus can be made by an entirely different process than what is claimed in claims 33 and 34.

Since applicant has received an action on the merits for the originally presented invention, this invention has been constructively elected by original presentation for prosecution on the merits. Accordingly, claims 33 and 34 are withdrawn from consideration as being directed to a non-elected invention. See 37 CFR 1.142(b) and MPEP § 821.03.

### ***Double Patenting***

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1, 6, 9, 11-13, 21-32 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 256-275 of copending Application No. 11/112,269. Although the conflicting claims are not identical, they are not patentably distinct from each other because they both teach a seed support medium containing seeds embedded in a pre-polymer cellular polymer and the polymer substrate is dry, hydrophilic and in a modular receptacle.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

#### ***Claim Objections***

Claim 22 is objected to under 37 CFR 1.75(c), as being of improper dependent form for failing to further limit the subject matter of a previous claim. Applicant is required to cancel the claim(s), or amend the claim(s) to place the claim(s) in proper dependent form, or rewrite the claim(s) in independent form. Claim 22 merely presents the limitation that the substrate is dry which is already presented in the independent claim 1.

#### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the

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invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1, 6, 9, 32, 22, 24-30 are rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent No. 3,812,619 to Wood et al in view of U.S. Patent Pub. No. US 2002/0104263 to Chang.

Regarding Claims 1, 22 and 24, Wood teaches seed support medium of a dry, hydrophilic, pre-polymer-seed-embedded cellular polymer substrate contained within a receptacle without germination of the seed (Wood Col. 1 line 7-9, line 29-34, line 52-62; Col. 8 line 50-55, line 65-68; Col. 9 line 9-14, line 26, line 34-36).

Wood is silent on explicitly teaching the particular structure of the receptacle/pot. However, Chang teaches a receptacle for receiving seeds and growth medium that is porous, cup-shaped, rigid, modular receptacle (Chang paragraph [0018] and Fig. 3 and 4). It would have been obvious to one of ordinary skill in the art to modify the teachings of Wood with the teachings of Chang at the time of the invention for the advantage of providing good aeration; recyclable; and resistant to impact or breakage as taught by Chang (Chang paragraphs [0008], [0010], [0011]).

Regarding Claim 6, Wood as modified teaches urethane polymer (Wood Col. 1 line 54).

Regarding Claim 9, Wood as modified teaches adjuvants (Wood Col. 9 line 9-14).

Regarding Claim 25-30, Wood as modified teaches the receptacle is coarse fibers of coconut or hemp, is hydrophilic and is natural or synthetic (Chang paragraph [0009] and [0018]).

Regarding Claim 32, Wood as modified teaches it is polymerized in the receptacle (Wood Col.5 line 49-50 poured into a mold)

Claims 11-13, 21, 23, and 31 are rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent No. 3,812,619 to Wood et al in view of U.S. Patent Pub. No. US 2002/0104263 to Chang as applied to claim 1 above, and further in view of U.S. Patent No. 4,124,953 to Patton.

Regarding Claims 12, 13, 21, 23, and 31, Wood as modified teaches transporting the medium and storing it, but is silent on a transparent, translucent, plastic seal upon the receptacle. However, Patton teaches a receptacle containing seeds and a growing medium with a transparent, translucent, plastic seal (Patton Fig. 1 #22 and 24; Col. 2 line 47-48; Fig. 3 #20) that regulates moisture during germination. It would have been obvious to one of ordinary skill in the art to further modify the teachings of Wood with the teachings of Patton at the time of the invention for the advantage of keeping all the components together during shipping and storage.

Regarding Claim 11, Wood as modified is silent on the seal is opaque. However, it would have been obvious to one of ordinary skill in the art to further modify the teachings of Wood at the time of the invention since the modification is merely a change in color for an aesthetic marketing effect and to meet the "Light" needs of different plant varieties.

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***Response to Arguments***


Applicant's arguments with respect to claims 1, 6, 9, 11-13, 21-32 have been considered but are moot in view of the new ground(s) of rejection.

***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Andrea M. Valenti whose telephone number is 571-272-6895. The examiner can normally be reached on 7:00am-5:30pm M-Th.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Peter M. Poon can be reached on 571-272-6891. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

  
Andrea M. Valenti  
Primary Examiner  
Art Unit 3643

20 December 2006